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March 11, 2005

TRA DOCKET ROOM

VIA HAND DELIVERY

Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to
Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Miller:

Consistent with the TRRO's explicit ban on new UNE-Ps, a number of state regulatory commissions have recently rejected CLECs' attempts to seek approval to continue to order UNE-Ps. The briefs BellSouth filed yesterday reference such orders from several state commissions, including orders from Indiana, Texas and Ohio, supporting the arguments made by BellSouth. BellSouth has just learned of additional orders, which are summarized in this letter.

The State Corporation Commission of Kansas ruled as follows on March 10:

The Commission agrees with SWBT's position regarding the self-effectuating nature of the TRRO as to serving new customers.

...

Last, any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented the sooner rules held to be illegal can be abrogated.¹

¹ *Order Granting in Part and Denying in Part Formal Complaint*, issued March 10, 2005, Kansas State Corporation Commission Docket No. 04-SWBT-763-GIT (copy attached)

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On March 8, 2005 the Rhode Island Public Utilities Commission unanimously adopted, on an interim basis, Verizon's tariff revision that implements the *TRRO*'s new UNE-Ps directive, and rejected the CLECs' requests that that Commission ignore the FCC's clear mandate.²

The state commissions of Maryland and Massachusetts have refused CLECs' attempts to convert implementation of the *TRRO* into an emergency requiring commission intervention. While the Maryland PSC would allow petitioner CLECs to, in the normal course of things, file "*individualized* petitions based upon their *particular* interconnection agreements and *specific* provisions of the *TRRO*," it reminded the parties that "the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules."³ That is, whatever the CLECs' particular grievance, the FCC's ban on new UNE-P orders by CLECs would take effect March 11, 2005. Similarly, in Massachusetts, the state commission declined to take emergency action to block implementation of the UNE-P ban on March 11, 2005, but would only consider the issues as part of ongoing arbitration proceedings.⁴

A copy of this letter is being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

² Open Hearing, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005*, Docket 3662 (March 8, 2005) (<http://www.ripuc.org/eventsactions/docket/3662page.html>)

³ See *In re Emergency Petition from MCI for a Commission Order Directing Verizon to continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341, Letter (Md PSC March 10, 2005) (copy attached). The PSC granted MCI's request to withdraw, and held CLECs' petitions to intervene mooted. It allowed the parties to pursue their dispute in Case No. 9026 under a typical hearing schedule.

⁴ See *Petition of Verizon New England for Arbitrating of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 and the TRO*, Case No. 04-33, Briefing Questions to Additional Parties, (Ma DTE March 10, 2005).

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Brian J. Mohne, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of a General Investigation to) Docket No. 04-SWBT-763-GIT
Establish a Successor Standard Agreement)
to the Kansas 271 Interconnection)
Agreement, Also Known as the K2A.)

**ORDER GRANTING IN PART AND DENYING IN PART FORMAL
COMPLAINT AND MOTION FOR AN EXPEDITED ORDER**

The above captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being duly advised in the premises, the Commission makes the following findings:

Background

1. On March 5, 2004, the Commission opened this docket to provide a proceeding to establish a successor agreement to the Kansas 271 Agreement (K2A). On November 18, 2004, the Commission issued an Order Denying Motion to Abate Arbitrations, Directing Arbitrations to Continue on Certain Issues, and Adopting Certain Terms on an Interim Basis. In this order, the Commission bifurcated the pending arbitrations, ordering the issues regarding UNEs, reciprocal compensation, and performance measurements to be decided in Phase II, and the remaining issues to be decided in Phase I. November 18, 2005 Order, 9-10. On January 4, 2005, the Commission granted SWBT's Petition for

Reconsideration and/or Clarification, and set forth deadlines for the Phase I arbitrator's award of February 16, 2005, and a final Commission order by May 16, 2005. With respect to Phase II, the Commission set the deadline for the arbitrator's award for April 29, 2005. The final Commission order on the Phase II arbitration is scheduled to be issued on June 30, 2005.

2. On March 3, 2005, Birch Telecom of Kansas, Inc., Cox Kansas Telecom, L.L.C., ionex communications, Inc., NuVox Communications of Kansas, Inc. and Xspedius Communications, L.L.C. (collectively, CLEC Coalition) filed their Formal Complaint and Motion for an Expedited Order (Complaint). The CLEC Coalition in their Complaint sought an order preventing Southwestern Bell Telephone, L.P. (SWBT) from amending or breaching its existing interconnection agreements with the CLEC Coalition members. Complaint, 1. The CLEC Coalition alleged that SWBT intends to amend or breach these interconnection agreements on March 11, 2005. Complaint, 1. On March 8, 2005, Navigator Telecommunications, LLC (Navigator) filed its Application to Join in Complaint Filed by CLEC Coalition. On March 7, 2005, AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. (AT&T) filed its Response to the CLEC Coalition's Complaint. On March 8, 2005, Prairie Stream Communications was added to the CLEC Coalition.

3. On March 4, 2005, the Commission issued its Order Establishing Procedural Schedule, requiring a response from SWBT by March 8, 2005, at 12.00 p.m. and setting the matter for oral argument on March 10, 2005. On March 7, the Staff of the Commission (Staff) filed its Response to Formal Complaint and Motion for Expedited

Order. SWBT filed its Answer and Response to Motion for Expedited Review on March 8, 2005. On March 8, 2005, the Citizens' Utility Ratepayer Board (CURB) filed its Response to the CLEC Coalition's Formal Complaint and Motion for Expedited Order.

4. The Commission heard oral arguments on the Complaint on March 10, 2005.

FCC Background

5. The Federal Communications Commission issued its Order on Remand in CC Docket No. 01-338 (TRRO) following remand in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). In the TRRO, the FCC clarified its unbundling framework under which impairment is to be evaluated. TRRO, ¶ 5. Also, it promulgated new impairment standards for dedicated interoffice transport, high-capacity loops, and mass market local circuit switching. TRRO, ¶ 5. Within the context of the new standards for impairment, the FCC specified various terms of transition for the CLEC's embedded customer base. TRRO, ¶ 5.

Jurisdiction

6. The Commission has jurisdiction over this matter pursuant to 47 U.S.C. § 252(b).

Self-Effectuating Nature of FCC Order

7. The CLEC Coalition argues that changes in the legal landscape effected by the FCC's TRRO should be incorporated into the existing interconnection agreements through negotiation prior to affecting the legal relationship between the CLECs and SWBT. Complaint, 2. This can be done, it maintains, through the section 252 process which refers to the present arbitrations discussed above. Complaint, 2-3. Therefore, the

CLEC Coalition seeks an order from the Commission declaring that the CLECs can continue to have access to SWBT's network pursuant to existing arrangements until the changes in the TRRO can be negotiated and implemented into new interconnection agreements.

8. SWBT disagrees with the CLEC Coalition's position, maintaining that the TRRO is self-effectuating and immediately bars CLECs from adding new customers based upon a UNE-P basis. Response, 9-10 SWBT explains that it makes no sense to hold otherwise. As the FCC has clearly espoused a desire to move away from UNE-P, it makes no sense to continue to permit CLECs to make these arrangements even on a temporary basis. Response, 10

9. The Commission agrees with SWBT's position regarding the self-effectuating nature of the TRRO as to serving new customers. First, the CLECs are incorrect to maintain that there is an existing interconnection agreement. Rather, the Commission extended the terms relating to UNEs, intercarrier compensation, and performance measurements on an interim basis. November 18, 2004 Order, 10-11 There is no basis for this Commission to order the parties to maintain a status quo while negotiating a new interconnection agreement within the legal context set forth by the FCC in its TRRO. Rather, as to new customers, the FCC has issued its rules regarding impairment and SWBT and the CLECs must abide by those rules for the simple reason that no contrary agreement exists. While some terms of the interconnection agreement were extended by the Commission, that extension is no longer valid in light of the FCC's order. Second, the Commission agrees with SWBT that the FCC is clear in that as of March 11, 2005, the

mass market local circuit switching and certain high-capacity loops are no longer available to CLECs on an unbundled basis for new customers. TRRO, ¶ 227 ("This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order"). It does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist. Last, any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.

Embedded Customer Base

10. The CLEC Coalition argues the "embedded customer base" referred to in the TRRO to which the transition period applies, refers to customers, not existing lines. Complaint, 9. SWBT takes the opposite position, arguing that the embedded customer base to which the transition period applies does not permit the CLECs to add new elements. SWBT Response, 3.

11. The Commission agrees with the CLEC Coalition regarding the meaning of "embedded customer base." First, the Commission finds that based on the language of the regulation adopted by the FCC's TRRO that it is the intent of the FCC that the transition period apply to customers, not lines. In the final regulations, the FCC ordered that ILECs are not required to provide access to local circuit switching on an unbundled

basis. 47 C.F.R. § 51.319(d)(2)(ii). However as to the "embedded base of end-user customers," the ILEC must provide such access. 47 C.F.R. § 51.319(d)(2)(iii). Consistent with the CLEC Coalition's position, the Commission interprets this language as referring to customers, not lines.

12. Second, the Commission is concerned with matters raised by the counsel for the CLEC Coalition in oral argument suggesting certain technical difficulties associated with mixing services based on a UNE-P basis and services based on a resale or commercial agreement basis for the same customer. Accordingly, the Commission finds that it is the intent of the FCC in its TRRO to permit CLECs to consistently serve its customer base, which includes adding services, lines, and servicing customers at new locations.

13. Last, the Commission finds that SWBT has a clear remedy in monetary terms in the event this Commission's definition of embedded customer base is wrong. Any changes in the arrangements of the parties will be subject to a true up. Therefore, the CLECs may be forced to compensate SWBT for the use of its facilities not at the unbundled rate, but at some other rate based upon resale or a commercial agreement. On the other hand, there is no similar remedy of true down for the CLECs. If the CLECs pay the rate based on a commercial agreement or resale, this arrangement will be outside the jurisdiction of the Commission and not subject to a revision in the future. After balancing the interests of the parties, the extent of injury the parties might suffer, and the interests of the public, the Commission concludes the balance of interests weighs in favor

of the CLECs in interpreting the FCC's intent in using the term "embedded customer base."

CLEC Access to Data Supporting Wire Centers

14. Staff raises an additional point in its response not addressed by the CLEC Coalition. Staff Response, ¶ 8. Staff is concerned that the data supplied by SWBT needed by the CLECs for making decisions on whether to self-certify that they are entitled to orders for dedicated transport and high-capacity loops is not accessible. Staff Response, ¶ 8. SWBT points out that the data supporting its wire center determinations is on file with the FCC and can be viewed, subject to the terms of a protective order. At oral argument, SWBT assured the Commission that, subject to the FCC protective order, the information is now or will be shortly made available in Kansas. If after review, CLECs self-certify in areas SWBT has determined to be ineligible, SWBT must follow the procedures outlined in ¶ 234 by processing the order and contesting the certification at the Commission.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission grants in part and denies in part the Complaint. The FCC's TRRO is to govern the relationship between SWBT and the CLECs as to new customers. As to the embedded customer base of the CLEC as that phrase is defined and interpreted above, SWBT and the CLECs are ordered to continue working under the terms of Phase I of the arbitration, in addition to those terms extended by the Commission's November 18, 2004 and January 4, 2005 Orders. The final deadline for an arbitrator's award is scheduled for April 29, 2005, at which time it will replace this order and become the

interim order of the Commission until the Commission finally approves the contracts filed pursuant to the Commission's order on the arbitration

B. This Order is to be served by facsimile transmission to the attorneys for SWBT and the CLEC Coalition. Other parties are to be served by mail.

C. A party may file a petition for reconsideration of this Order within fifteen (15) days from the date of service of this Order. K.S.A. 66-118b, K.S.A. 2004 Supp. 77-529(a)(1).

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary.

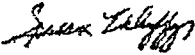
BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Comm.; Moffet, Comm.

Dated: MAR 10 2005

ORDER MAILED

MAR 11 2005

 Executive Director

Susan K. Duffy
Executive Director

sre

STATE OF MARYLAND



ROBERT L. EHRLICH, JR.
GOVERNOR

MICHAEL S. STEELE
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PUBLIC SERVICE COMMISSION

ML# 96341

March 10, 2005

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Re: Emergency Petition of MCI for a Commission Order Directing Verizon to
Continue to accept New Unbundled Network Element Platform Orders

Dear Counsel:

On March 1, 2005, MCImetro Access Transmission Services, LLC ("MCI") petitioned the Public Service Commission ("Commission") for an order directing Verizon Maryland Inc. ("Verizon") to comply with the "change of law" provisions contained in the parties' interconnection agreement ("ICA"). Furthermore, MCI seeks a directive to Verizon that it continue to accept and process unbundled network element platform ("UNE-P") orders until such time as it has concluded the change of law process. On March 7, 2005, a Petition to Intervene and Comments in Support of MCI's Emergency Petition was filed on behalf of Allegiance Telecom of Maryland, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, SNiP LiNK LLC, and XO Maryland LLC (hereinafter referred to collectively as "Petition Supporters"). On March 8, 2005, Verizon filed its Opposition to the Emergency Petition of MCI. Subsequently, on March 10, 2005, MCI filed a letter withdrawing, without prejudice, its Emergency Petition stating that it had reached a commercial agreement with Verizon that resolved the issue raised in its Petition.

As a general matter, the Commission is pleased to see parties resolve their differences outside of formal adjudication. The Commission encourages the parties to continue to work together in the future to similarly address disputes that may arise. MCI's request to withdraw its Emergency Petition is hereby granted.

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With respect to the Petition Supporters, the Commission notes that given MCI's withdrawal of its Petition, the issue of intervention becomes moot. As such, the Commission hereby denies the request of the Petition Supporters to intervene in the MCI/Verizon interconnection agreement dispute. To the extent the Petition Supporters believe that their specific interconnection agreements, or the *Triennial Review Remand Order*¹ itself, do not support any proposed action of Verizon the Petition Supporters may file individualized petitions based upon their particular interconnection agreements and specific provisions of the *Triennial Review Remand Order* for the Commission's consideration. For this purpose, the Commission will designate Case No. 9026 as the vehicle for parties to file such petition. Additionally, the Commission would remind MCI, Verizon and the Petition Supporters that the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules, including those specifying the procedures to be employed when orders for unbundled loops or transport are disputed. At this point in time, the Commission is not aware of any actual disputes regarding loop or transport orders. If any such disputes arise, Verizon and the ordering carrier are directed to abide by the FCC's direction in the *Triennial Review Remand Order* to fill the order and to then bring the dispute to the Commission, which will resolve the matter expeditiously. We note in this regard Paragraph 234 of the *Triennial Review Remand Order* which provides that "the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."

By Direction of the Commission,

O. Ray Bourland
Executive Secretary

cc: Andrea Pruitt Edmonds, Esquire, Counsel for Petition Supporters
Parties of Record, Case No. 9026

¹ In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, WC Docket No 04-313, CC Docket No 01-338, FCC 04-290 (rel February 4, 2005) ("*Triennial Review Remand Order*")

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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